YEE SENG PLANTATIONS SDN BHD

v.

KERAJAAN NEGERI TERENGGANU & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: T-01-105-97]
12 JUNE 2000

ADMINISTRATIVE LAW: *Administrative powers - Land acquisition - Consent order gives rise to legitimate expectation - Whether state authority bound by doctrine of res judicata*

CONTRACT: *Frustration - Impossibility - Self-imposed frustration - Whether refusal of State Exco a supervining event - Contracts Act 1950, s. 57(2)*

LAND LAW: *Acquisition of land - Consent order - Entered by state government - Whether State Exco bound - National Land Code 1965, s. 16(2) - Whether state authority to be implead in a suit*

This appeal has been brought against the order of the High Court at Kuala Terengganu granting a declaration that certain paragraphs of a consent order made in earlier proceeding between the appellant and the 2nd, 3rd and 4th respondents are no longer binding on the respondents.

The appellant was the sub-lessee of certain lands in Kerteh, Terengganu. In 1984 and 1986, the state government acquired some 3132 acres of the land under eight notifications published in the gazette. The appellant objected to this acquisition and its objection was referred to the High Court under the Land Acquisition Act 1960. Following negotiations between the appellant's solicitors and the state legal adviser, the action was compromised and a consent order entered into.

However, difficulties arose when the state executive council ('the Exco') of the 1st respondent decided to reject the appellant's application for the alienation of the Kerteh land referred to in the consent order on the ground that the National Land Code 1965 vests the power to alienate land in the sole discretion of the Exco. As such the said consent order was said to be frustrated.

The trial judge declared that the 1st respondent was not bound by the consent order and the appellant appealed. Three main issues were raised in the appeal *ie*, (i) whether the 1st respondent had been impleaded as a party to the first action and therefore bound by its term; (ii) whether the consent order had become frustrated and (iii) whether the respondents adopted the correct procedure.

Held:
Per Gopal Sri Ram JCA

[1] It is a fundamental principle of our system of jurisprudence that only a party to proceedings may be bound by an order made therein.

[2] It is clear from s. 16(2) of the National Land Code that the state authority is to be impleaded in a suit or other proceeding by citing the state director as a party. Further, it is not in dispute that the second respondent, the state director, was a defendant in the action, the state authority was therefore a party to the action by virtue of s. 16(2) of the Code.

[3] It is clear from well established authority that a state government is bound by the doctrine of *res judicata.*

[4] It is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. The refusal of the Exco to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. Therefore, it is not open to the respondents to rely on the doctrine of frustration.

[5] The second proviso to s. 29 of the Government Proceedings Act 1956 has nothing to do with the facts of this case. There is no bar to the Exco binding itself to alienate land to any person. Once the agreement was entered into and formalised as a rule of court, it vested in the appellant a legitimate expectation that the promise made to it will be carried out.

[Appeal allowed with costs.]

*[**Bahasa Malayssia** Translation Of Headnotes]*

Rayuan ini adalah terhadap perintah Mahkamah Tinggi di Kuala Terengganu yang memberikan satu pengisytiharan bahawa beberapa perenggan tertentu dalam satu perintah persetujuan yang dibuat dalam prosiding yang terdahulu antara perayu dan responden kedua, ketiga dan keempat tidak lagi mengikat responden-responden.

Perayu merupakan penerima pajakan kecil beberapa tanah tertentu di Kerteh, Trengganu. Dalam tahun 1984 dan 1986, Kerajaan Negeri telah memperolehi lebihkurang 3132 ekar tanah di bawah lapan pemberitahuan yang diterbitkan dalam warta. Perayu telah membantah pengambilan ini dan bantahannya telah dirujuk kepada Mahkamah Tinggi di bawah Akta Pengambilan Tanah 1960. Berikutan dengan rundingan di antara peguamcara perayu dan penasihat undang-undang negeri, tindakan tersebut telah dikompromi dan satu perintah persetujuan telah dimasuki.

Walaubagaimanapun kesukaran berbangkit apabila majlis mesyuarat kerajaan negeri ('Exco tersebut') responden pertama membuat keputusan untuk menolak permohonan perayu untuk pemberimilikan tanah di Kerteh yang dirujuk dalam perintah persetujuan atas alasan bahawa Kanun Tanah Negara 1965 meletakkan kuasa memberimilik tanah dalam budibicara tunggal Exco. Oleh itu perintah persetujuan tersebut dikatakan telah dikecewakan.

Hakim perbicaraan mengisytiharkan bahawa responden pertama tidak terikat oleh perintah persetujuan tersebut dan perayu telah merayu. Tiga isu utama telah dibangkitkan didalam rayuan ini iaitu (i) samada responden pertama telah dinamakan sebagai satu pihak didalam tindakan pertama dan dari itu terikat dengan termanya; (ii) samada perintah persetujuan itu telah dikecewakan dan (iii) samada responden-responden telah menggunapakai prosedur yang betul.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ianya merupakan satu prinsip penting sistem jurisprudens kita yang hanya sesuatu pihak kepada prosiding boleh terikat dengan sesuatu perintah yang dibuat di dalamnya.

[2] Adalah jelas dari s. 16(2) Kanun Tanah Negara bahawa pihak berkuasa negeri haruslah dinamakan dalam sesuatu guaman atau prosiding yang lain dengan menyebut pengarah negeri sebagai satu pihak. Selanjutnya, ianya tidak dipertikaikan bahawa responden kedua, pengarah negeri, adalah satu pihak didalam tindakan itu, pihak berkuasa negeri dengan itu adalah satu pihak dalam tindakan ini selaras dengan s. 16(2).

[3] Adalah jelas dari otoriti bahawa kerajaan negeri terikat dengan doktrin *res judicata.*

[4] Adalah telah diketahui umum bahawa doktrin kekecewaan tidak mempunyai ruang untuk kesilapan pada pihak yang memplidnya. Keengganan Exco untuk memberimilik tanah-tanah tersebut adalah satu perbuatan ketidakpatuhan perintah persetujuan yang sengaja di satu

pihak kepada tindakan pertama itu. Oleh yang demikian, ianya tidak terbuka kepada responden-responden untuk bergantung pada doktrin kekecewaan.

[5] Peruntukan kedua kepada s. 29 Akta Prosiding Kerajaan 1956 tidak mempunyai perkaitan dengan fakta-fakta kes ini. Tidak ada halangan kepada Exco mengikat dirinya sendiri untuk memberimilikan tanah kepada mana-mana orang. Sebaik sahaja perjanjian tersebutdimasuki dan dirasmikan sebagai satu keputusan mahkamah, ianya meletakhak kepada perayu satu harapan sah bahawa janji yang dibuat kepadanya akan dilaksanakan.

[Rayuan dibenarkan dengan kos.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Brydges v. Brydges & Wood [1909] P 187 ***(refd)***

Dato' Yap Peng & Ors v. Public Bank Bhd & Ors [1997] 4 CLJ 115 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1140 ***(refd)***

Ibeneweka v. Egbuna [1964] 1 WLR 219 ***(refd)***

Ocean Tramp Tankers v. V/O Sovfracht [1964] 1 All ER 161 ***(refd)***

Khaw Poh Chuan v. Ng Gaik Peng [1996] 2 CLJ 185 ***(foll)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Sungai Wangi Estate v. Uni [1975] 1 MLJ 136 ***(not foll)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 ***(refd)***

Tong Lee Hwa v. Chin Ah Kwi [1971] 2 MLJ 75 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 57(2)

Government Proceedings Act 1956, s. 29(b)

National Land Code 1965, ss. 5, 16(2), (3), 42

Other source(s) referred to:

Liability of the Crown, Prof Hogg, p 191

For the appellant - RR Sethu (S Kanawangi & Mokhtar Ngah with him); M/s Mokhtar Ngah & Co

For the respondents - Abdul Karim Abdul Rahman (Dato' Wan Farid Wan Salleh with him)

[Appeal from High Court, Kuala Terengganu; Originating Summons No: 24(21)-66-1997]

Reported by Yow Ting Fong

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JUDGMENT

Gopal Sri Ram JCA:

The Background

b This appeal has been brought against the order of the High Court at Kuala Terengganu granting a declaration that certain paragraphs of a consent order made in earlier proceedings between the appellant and the second, third and fourth respondents are no longer binding on the respondents. To appreciate the issues raised in this appeal, it is necessary to recite the factual background against which this appeal rests.

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The appellant was at all material times the sub-lessee of certain lands ("the said land") in Kerteh, in the state of Terengganu. The exact area of the said land is uncertain, as it has not been surveyed. But it is not in dispute that it is between 15000 and 20000 acres. In the years 1984 and 1986, d the government of the state of Terengganu acquired some 3132 acres of the said land under eight notifications published in the gazette. We will, for convenience refer to these 3132 acres as "the acquired lands". The appellant objected to this acquisition and its objection was, in the usual way, referred to the High Court under the provisions of the Land e Acquisition Act 1960. In the meantime the appellant took out an originating summons no. 21(24)-87-94 ("the first action") challenging the acquisition of the acquired lands. The second, third and fourth respondents were cited as defendants in the first action. The state legal adviser represented them.

Following negotiations between the appellant's solicitors and the state legal f adviser, the first action was compromised. On 17 November 1991, counsel for the disputants appeared before the judge at the High Court at Kuala Terengganu and recorded the agreement between them in the form of a consent order ("the said consent order"). It contains fourteen paragraphs. They read as follows:

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> (1) The Menteri Besar, Terengganu, within the meaning of the Menteri Besar (Incorporation) Enactment 1951 (hereinafter called the said Menteri Besar) shall surrender or cause to be surrendered all the Concession land known as the Kerteh Concession, in the District of Kemaman, in the State of Terengganu (hereinafter referred to as the said Kerteh Concession) to the h State Authority of Terengganu (hereinafter called the said State Authority), through the Pengarah Tanah dan Galian, Terengganu (hereinafter called the said Pengarah Tanah dan Galian); the said Kerteh Concession comprising of:
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> (a) all that Concession known as the Kerteh Concession in the Mukim i of Kerteh in the District of Kerteh, Terengganu granted by His Royal Highness, the Sultan of Terengganu to the late Tungku Musa bin Tungku Sulaiman.

(b) All that the three (3) Leases dated 16th day of Rabial Akhir 1326 (corresponding to 27th day of April 1909) of 3,500 acres for 99 years; 8th day of Sha'aban 1328 (corresponding to 14th day of August 1910) of an additional area of 3,500 acres for 99 years; and 8th day of Zulakaedah 1329 (corresponding to 30th day of August 1911) of approximately 180 acres for, 99 years of Portions of the said Kerteh Concession from the late Tungku Musa bin Tungku Sulaiman to the East Asiatic Company Limited and the vesting of all the rights interest, title thereof by the said East Asiatic Company Limited to the East Asiatic Industry and Plantation Company Limited by an Agreement made in 1919 and the transfer and/or assignments of the residue then unexpired thereof to the plaintiff, then known as Yee Seng Plantations Limited and now known as Yee Seng Plantations Sdn. Berhad by an Indenture dated 16th June 1966.

(c) Two (2) Leases dated 8th day of Sha'aban 1328 (corresponding to the 14th day of August 1910) of 3,500 acres for 99 years and 15th day of Jamudilakhir 1335 (corresponding to 7th April, 1917) of an additional 5,000 for 99 years of Portions of the said Kerteh Concessions by Tungku Musa bin Tungku Sulaiman to the East Asiatic Company Limited and the transferring thereof by the East Asiatic Company to the East Asiatic Rubber Estates Limited by a Transfer dated 20th day of June 1923 and the transfer/assignments of the residue then unexpired thereof by the said East Asiatic Rubber Estates Limited to the plaintiff, then known as Yee Seng Plantations Limited and now known as Yee Seng Plantations Sdn Berhad by an Indenture dated 16th June 1966.

(2) The said Pengarah Tanah dan Galian, the Collector of Land Revenue, Kemaman, Terengganu (hereinafter called the said Collector of Land Revenue) and the said Menteri Besar will assist the said Kerteh Concession land to be surveyed at the Plaintiff's own costs.

(3) After the said survey of the said Kerteh Concession, the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall then cause the said State Authority to alienate or realienate an area of not less than five thousand (5,000) acres of the land forming part of the said Kerteh Concession as delineated and coloured green on the plan annexed hereto to the Plaintiff abovenamed Yee Seng Plantations Sdn Berhad (hereinafter called the Plaintiff) by a Qualified title which shall be for the period of ninety nine (99) years at the premium not exceeding the sum of Ringgit Four hundred ($400.00) per acre and the said Qualified title to be replaced by a Final Title.

(4) As the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar are unable to alienate further acreage to the Plaintiff in the Kerteh Concession due to the same being: encumbered with the issuance of Temporary Occupation Licences, the said

Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall (subject to payment of dislocation costs to the Plaintiff as, hereinafter set out) cause the said State Authority to alienate, by a Qualified Title to be replaced by a Final Title, an area of a further five thousand (5,000) acres of the land at Ketengah as delineated and coloured blue on the plan annexed hereto after survey, to the Plaintiff for the period of sixty (60) years at the premium not exceeding the sum of Ringgit Three hundred ($300.00) per acre.

(5) The title or titles to the said lands to be alienated or realienated to the Plaintiff as set out in paragraphs (3) and (4) hereof shall be free of all encumbrances and restrictions of whatsoever nature except that, the same shall not be transferred or charged without the consent of the said Pengarah Tanah dan Galian and that the said lands can be used for such agricultural purposes as the Plaintiff abovenamed deems fit and all the lands alienated or to be realienated to the Plaintiff as aforesaid shall be absolutely vacant.

(6) On the alienation or realienation of said lands to the Plaintiff as aforesaid and on the issuance of the documents of title in respect thereof to the Plaintiff as aforesaid, the Plaintiff shall surrender the Kerteh Concession to the State Authority within 30 days from the delivery of the issued documents of titles as aforesaid to the Plaintiff.

(7) For the acquisition of the Kerteh Concession land pursuant to the aforesaid Land Acquisition References and other proceedings, after taking into consideration the alienation or realienation of the land at Kerteh as aforesaid, the alienation of the land at Ketengah as aforesaid and the dislocation costs as hereinafter set out, the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall pay to the Plaintiff, the additional agreed sum of Ringgit Twelve million and five hundred thousand ($12,500,000.00). The Pengarah Tanah dan Galian, Terengganu, the Collector of Land Revenue, Kemaman, Terengganu and the Menteri Besar, Terengganu shall pay or cause to be paid to the Plaintiff the said additional sum of $12,500,000.00 in the manner following, *viz:*

(a) The sum of Ringgit Five million ($5,000,000.00) within one (1) month from the date of this Order;

(b) The balance of Ringgit Seven million and five hundred thousand ($7,500,000.00) less all the premium due, to be paid by April 1992 but not later than 30th June 1992.

(8) The said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall cause the deposits lodged Plaintiff in the Acquisition References to be refunded to the Plaintiff by the said Collector of Land Revenue or such other appropriate authority or authorities.

(9) As the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar are unable to alienate or realienate a further five thousand (5,000) acres of land in Kerteh to the Plaintiff, due to unavoidable circumstances understood by both parties, the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall cause five thousand (5,000) acres of land in Ketengah to be alienated to the Plaintiff *in lieu* thereof as aforesaid, and the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall further pay or cause to be paid to the Plaintiff, the further agreed sum of Ringgit three million ($3,000,000.00) as Dislocation Costs which said sum the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall pay or cause to be paid to the Plaintiff as soon as practicable after the payment stipulated in clause (7)(b) above but not later than 31st March 1993.

(10) The Plaintiff shall be at liberty to appeal to the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar or to the appropriate authority for a reduction in the premiums and the same shall be considered favourably by the appropriate authority or authorities.

(11) All the lands to be realienated and alienated to the Plaintiff, as aforesaid, shall be subject to survey and shall be absolutely vacant.

(12) In the event, the documents of title to the lands to be realienated and alienated to the Plaintiff are issued before the last payment of the monies is due for payment to the Plaintiff pursuant to paragraph 7(b) hereof, then the premiums payable shall be deducted from this payment. In the event the documents of title to the land to be realienated and alienated to the Plaintiff are issued after the last payment of the monies is due for payment to the Plaintiff pursuant to paragraph 7(b) hereof, then the premiums payable shall be paid by the Plaintiff on the issuance and delivery of the said documents of title to the Plaintiff, in which event the monies payable to the Plaintiff pursuant to paragraph 7(b) hereof shall be paid or caused to be paid by said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar on the date due for payment as therein ordered.

(13) The Plaintiff shall not be at liberty to contend that the said Consent Order dated the 29th day of October 1982 made in Kuala Terengganu High Court Land Reference No 1 of 1979 is irregular or bad in law and shall not be at liberty to take any steps or any proceedings questioning the validity of the said Consent Order.

(14) The Plaintiff shall not proceed further with the aforesaid Land References and shall withdraw or discontinue the same upon the finalisation of all the matters herein.

It is common ground (and the learned judge accepted this) that following the entry of this consent order steps were taken by the parties to the first action to implement its terms. However, difficulties arose when the state authority, namely, the state executive council ("the Exco") of the first respondent decided to reject the appellant's application for the alienation of the Kerteh land referred to in the consent order. This happened on 23 July 1996. The decision of the Exco was communicated to the respondent by the land administrator in his letter dated 3 February 1997.

On 29 May 1997, the instant respondents commenced an action by an originating summons ("the second action"). In it they sought a declaration that they were not bound by the terms of the said consent order, in particular, but not limited to, paras. 3 to 14 thereof. It was the respondents' case in support of its summons that the second, third and fourth respondents had fulfilled such of the terms of the said consent order as lay within their power to do. In respect of the obligation to secure the alienation of the Kerteh land, this was not something over which they had any control. This is because of the provisions of the National Land Code 1965 ("the Code') which vests the power to alienate land in the sole discretion of the Exco. The decision of the Exco was a supervening event over which the respondents had no control. As such the said consent order, or so much of it as remained unperformed, was frustrated. The respondents were therefore discharged from further performance of the agreement embodied in the said consent order. So much for the respondents' case.

The appellant had, on 30 July 1997, taken out a motion in the first action to enforce the terms of said consent order. At that point in time, the appellant was unaware that the second action had been commenced. That is because the respondents' summons in the second action was only served on the appellant on 3 August 1997. However, on the application of the learned state legal adviser, the appellant's motion was adjourned pending the hearing and disposal of the second action.

The learned judge who heard the second action agreed with the respondents' arguments and granted the relief sought by them. The learned judge declared that the first respondent was not bound by the consent order dated 17 November 1991 made in the first action. He also declared that the consent order had become frustrated in consequence of the decision of the Exco. He thus absolved the second, third and fourth respondents from any liability for non-compliance with the terms of the consent order. The appellants have attacked these findings before us.

The Issues

Counsel for the appellant raised a number of issues during his argument. But in reality there are only three issues that are central to this appeal. First, whether the first respondent had been impleaded as a party to the first action and was therefore bound by its terms. Second, whether the consent order had become frustrated. Third, whether the respondents adopted the correct procedure. We will address each of these issues in turn.

The First Issue: Was The First Respondent Bound By The Consent Order?

It is a principle, fundamental to our system of jurisprudence, that only a party to proceedings may be bound by an order made therein. (See, *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 CLJ 191). As presently advised we find only two exceptions to this rule. Both are of limited application. The first concerns injunctions which may be made binding upon the servants and agents of a party although such servants or agents are not themselves expressly made parties to the proceedings. (See *Brydges v. Brydges & Wood* [1909] P. 187.) The second exception is where a person who is interested in the proceedings is not a party but is "in reality fighting the suit, so to say, from behind the hedge" (per Viscount Radcliffe in *Ibeneweka v. Egbuna* [1964] 1 WLR 219.) Thus, in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor.* [1992] 2 CLJ 1140, Edgar Joseph Jr. SCJ observed (at p. 1146):

> As for the other contention based upon the breach of the rule of natural justice, to wit, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the court below seeking declaratory reliefs, and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position, and therefore they should have been made parties to those proceedings. That, however, is not conclusive of the issue before us. Those proceedings had right from the start received considerable treatment in the local press, and both Haji Samat and Haji Mahmud must have known about them; yet they remained passive and did nothing; they made no attempt to apply to be joined as defendants, which they certainly could have done. A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain.
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> I find, therefore, that there is substance in the submission of counsel for the plaintiffs that the State Legislative Assembly of Kelantan is, in reality, as he put it, fighting the suit on behalf of Haji Samat and Haji Mahmud.
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> In this context, I consider the following passage in the judgment of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v. Egbuna* at p 266 to be apt:

> ... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented – the Obosi people – and had fought the case on that basis, and where, as here, the trial judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the judge from making a declaration of title in the respondents' favour.
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> Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned judge was not prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the court.

The appellant has argued that the first respondent was indeed a party to the first action and was therefore bound by the terms of the consent order. In support of this submission, the appellant relies on the provisions of s. 16(2) and (3) of the Code. Those provisions read as follows:

> 16 (2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.
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> (3) In any action, suit or other proceeding to which this section applies, the State Director may appear personally, or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser or any Land Administrator or other officer appointed under sub-section (1) of section 12.

It is manifestly clear from the plain language of the second subsection to s. 16 that the state authority is to be impleaded in a suit or other proceeding by citing the state director as a party. And, "state director" according to s. 5 of the Code "means the director of Lands and Mines for the state appointed under s. 12 and includes a deputy director of Lands and Mines appointed thereunder."

It is not in dispute that the second respondent, the state director, was a defendant in the first action. He was the first defendant. The state authority was, therefore, a party to the first action by virtue of s. 16(2) of the Code. Further, the state legal adviser represented the defendants in the first action. There is no suggestion anywhere in the affidavits delivered by the instant respondents in the second action that the learned state legal adviser had no authority to agree to the terms set out in the consent order. It would be quite intolerable if in these circumstances the state authority were permitted to assert a lack of authority on the part of those nominated by the Code to represent it in litigation.

Further, it is equally clear from well-established authority that a state government is bound by the doctrine of *res judicata.* In this context it is sufficient to quote from the second edition of Professor Hogg's work *"Liability of the Crown"*, p. 191:

> The doctrine of *res judicata* is sometimes treated as a kind of estoppel, namely, estoppel by record. The doctrine stipulates that a judicial decision (unless reversed on appeal) is binding on the parties to the litigation, so that the same issue may not be re-litigated by the parties: once decided by a court of competent jurisdiction, the issue is said to be *res judicata.* The doctrine is obviously required in order to bring disputes to an end. Indeed, litigation would have little point if the losing party, without appealing, or after exhausting appeals, were free to ignore the judgment and return to the courts again.
>
> The Crown is bound by *res judicata*. Any other conclusion would be fundamentally inconsistent with the Crown's subjection to legal proceedings in tort, contract and other heads of liability, which must surely imply that the Crown is bound by the outcomes.

It follows from what has been said thus far that the first issue must be resolved in the appellant's favour.

The Second Issue: Was There Frustration?

The consent order in the first action embodied the agreement that was entered into between the parties to the first action. It was therefore a contract that had been made into a rule of the court so that the ordinary principles governing the law of contract would apply in its enforcement. See *Tong Lee Hwa v. Chin Ah Kwi* [1971] 2 MLJ 75. A *fortiori,* the question whether any of the parties to the agreement embodied in the consent order has been discharged from further performance.

The law of frustration is contained in s. 57(2) of the Contracts Act 1950 which reads:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The section postulates two supervening events that frustrate a contract. The first is an event that makes the contract impossible of performance, the second is the event of supervening illegality.

In *Ocean Tramp Tankers v. V/O Sovfracht* [1964] 1 All ER 161 (CA), Lord Denning MR explained the operation of the doctrine. He said (at p. 166):

> It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *W J Tatem Ltd v. Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.
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> We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors Ltd v. Fareham UDC* [1956] 2 All ER 145 at p. 160; [1956] AC 696 at p. 729, per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v. Noblee & Thord GmbH* [1961] 2 All ER 179 at pp 185, 187, [1962] AC 93 at pp 116, 119, per Viscount Simonds and per Lord Reid.

Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See, *Dato Yap Peng & Ors v. Public Bank Bhd & Ors* [1997] 3 MLJ 484. The Master of the Rolls dealt with the point in *Ocean Tramp Tankers v. V/O Sovfracht (ibid)* as follows (at p. 165):

> The second question is whether the charterparty was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration; see *Maritime National Fish Ltd. v Ocean Trawlers Ltd.* [1935] AC 524.

So too here. The refusal of the Exco to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. In these circumstances, it is not open to the instant respondents to rely on the doctrine. The doctrine of frustration has absolutely no application whatsoever to the fact pattern that forms the core of this appeal.

The other point raised by the respondents in the same context may also be conveniently disposed of at this stage. It has to do with s. 29 of the Government Proceedings Act 1956. The respondents relied on proviso (b) to that section in support of their case. We will reproduce the whole provision. It reads as follows:

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that –
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may *in lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

The proviso is relevant to coercive proceedings to recover land from a government, be it Federal or that of a State, eg, on the expiry of a tenancy. It is designed to prevent a writ of possession issuing against the Government in execution of a judgment for possession. It follows that the short answer to the respondents' argument is that the second proviso has nothing whatsoever to do with the facts of this case. There is no bar to the Exco binding itself to alienate land to any person. This is precisely what happened here. Once the agreement was entered into and formalised as a rule of court, it vested in the appellant a legitimate expectation that the promise made to it will be carried out.

The law governing the doctrine of legitimate expectation in public law must now be taken to have been authoritatively settled by the judgment of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65. There, Edgar Joseph Jr. FCJ said (at p. 117):

For our part, we prefer the view of Simon Brown LJ in *Ex parte Baker* [1995] 1 All ER 73 and Sedley J in *Ex parte Hamble* [1995] 2 All ER 714 as we find the reasoning there more persuasive. It is also a view which appears to be supported by de Smith, as the following extracts from his book, *Judicial Review of Administrative Action* (5th Ed), indicate (at paragraph 13-034):

> Given the duty of a public body not to fetter its discretion under what circumstances will a legitimate expectation be protected in the face of a change in policy. Clearly, the change of policy must be 'a lawful exercise of discretion' (per Lord Scarman in *Re Findlay* [1985] AC 318, 338). The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorised and not extraneous purposes. These considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion be exercised unreasonably – for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation.

It follows as a matter of pure logic from what we have said thus far, that the respondents' contention based on s. 42 of the Code also falls by the wayside. That section vests the power in the Exco to alienate land. That is precisely what the Exco agreed to do in the first action. At the risk of repetition we would say that the Exco's later change of heart is not a supervening event that frustrated the consent order. It was a breach of an obligation voluntarily undertaken and given effect to in the form of an order of the court.

For these reasons, we would resolve the second issue also in the appellant's favour.

The Third Issue: Was The Correct Procedure Employed?

Counsel for the respondents has, both in his oral and written argument, submitted that the respondents had employed the wrong procedure. The argument here is that a declaration in the terms sought by the appellant would result in there being two inconsistent decisions in the same matter. The judgment of Abdoolcader J, (as he then was) in *Sungai Wangi Estate v. Uni* [1975] 1 MLJ 136 was cited in support of this argument. With respect, we do not agree with this submission.

It must be remembered that the respondents' case in the court below was that the consent order had become void because it had been frustrated. It was also their case that the order had been made in breach of written law, namely s. 42 of the Code and the second proviso to s. 29 of the Government Proceedings Act 1956. Assuming they were correct in these

arguments, the result would have been that the consent order was a nullity as having been entered in breach of written law. In such event, the respondents would have been entitled to a declaration to that effect. The point is sufficiently covered by the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75. That was a case where the appellant had taken out an originating summons for declaratory relief to rid himself of an order made in contravention of written law. Mohd Azmi FCJ who delivered the principal judgment of the court said (at p. 93):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

Accordingly, the reliance on *Sungai Wangi Estate v. Uni (ibid)* is misplaced. In any event, this court in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 CLJ 748 overruled that case. It is our earnest hope that we will not hear of it again.

Further, we agree with the submission of the respondents that a consent order may be set aside in a fresh action on the same grounds on which an agreement may be set aside. If authority is required for this proposition, it is to be found in the decision of the Federal Court in *Khaw Poh Chhuan v. Ng Gaik Peng* [1996] 2 CLJ 185. However, whether an action to impeach a consent judgment in a former action will succeed must depend upon the facts of the particular case. And, as we have already said, the respondents in the present instance have not made out a case to impeach the judgment in the first action.

Miscellaneous Points

The appellant has raised several other arguments including an argument that the respondents had acted inequitably in pursuing the second action when the appellant had acted to its detriment in reliance of the consent order. Our attention was drawn to the several acts done by the appellant upon

the faith of the consent order in the first action. We do not propose to discuss them here. Neither do we propose to discuss the authorities we were regaled with on the point. That is not to say that the points raised by the appellant lack merit. But by reason of the route we have taken, we find it unnecessary to deal with the other points raised by the appellant.

Conclusion

For the reasons already given, the appeal succeeds. The declarations granted by the learned judge in the second action are set aside. The respondents' summons in the second action is dismissed. For completeness, the appellant's motion in the first action is restored to file with a direction that it be fixed for hearing. The appellant will have the costs of the appeal and those incurred in the court below. The costs in this court include the costs of the appellant's motion to add new grounds of appeal. The deposit in court shall be refunded to the appellant.